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November 30, 1993

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Implementation of Section 309(j) of the
Communications Act, Competitive Bidding
PP Docket No. 93-253

Dear Mr. Caton:

On behalf of Suite 12 Group ("Suite 12"), enclosed please find an original and nine (9) copies of its Reply Comments filed in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
Charles R. Milkis
Counsel for Suite 12 Group

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of
Section 309(j) of the
Communications Act
Competitive Bidding

PP Docket No. 93-253

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To the Commission

REPLY COMMENTS OF SUITE 12 GROUP

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To: The Commission

REPLY COMMENTS OF SUITE 12 GROUP

Suite 12 Group ("Suite 12"), by its attorneys, hereby files Reply
Comments in the above referenced proceeding.

I. BACKGROUND

Suite 12 Group ("Suite 12") is an entrepreneurial inventor of a
revolutionary wireless cellular technology capable of offering consumers a high
quality, low-cost competitive alternative to cable television and other multimedia
services through the spectrum efficient use of the fallow 28 GHz spectrum band.
The reallocation of the 28 GHz band for the proposed Local Multipoint
Distribution Service ("LMDS") is the subject of a pending rulemaking
proceeding, in which the Commission has tentatively concluded that Suite 12
should be granted a pioneer's preference for its efforts in developing the
CellularVision technology. See Rulemaking to Amend Part 1 and Part 21 of the

Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, ("LMDS NPRM"), 8 FCC Rcd 557 (1993).¹

Suite 12 believes that in considering the adoption of a competitive bidding scheme, the Commission must adhere to the explicit Congressional intent of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), and maintain the pioneer's preference rules in an unaltered fashion, regardless of what auction rules it may adopt. Furthermore, should the Commission establish an auction scheme for LMDS, Suite 12 urges the Commission to adopt specific measures to ensure that its auction procedures will promote small business, prevent the concentration of licenses, ensure effective competition by disseminating licenses among a wide variety of applicants, and support the development of new technologies for the benefit of the public -- public policy goals explicitly mandated by Congress. See 47 U.S.C. § 309(j)(3).

Accordingly, Suite 12 reiterates that if the Commission decides to issue LMDS licenses by competitive bidding, it must, at a minimum:

- (1) adopt a realistic definition of "small business" to include only companies with annual sales of \$75 million or less;
- (2) allow small businesses to pay for the spectrum they secure on an interest-free, installment basis during the life of the license; and,
- (3) exclude incumbent spectrum users in competing services from acquiring controlling interests (i.e., no greater than 49% ownership) in LMDS applicants or licensees.

¹ In the LMDS NPRM, the Commission proposed the allocation of two 1 GHz blocks of spectrum (27.5 -29.5 GHz) per service area, with 1 GHz per licensee, so that LMDS licensees would have sufficient bandwidth within which to compete with incumbent service providers.

Without the inclusion of these minimal safeguards in any competitive bidding process adopted by the Commission for LMDS, Suite 12 and other small businesses will be thwarted in their ability to provide the U.S. public with high quality, low-cost spectrum efficient services which can compete directly with cable and other incumbent spectrum users.

II. ARGUMENT

The instant NPRM attracted a large number of filings addressing all aspects of the Commission's proposed competitive bidding scheme. Suite 12 urges that the Commission act prudently, and consistent with Congressional intent, to ensure that competition is promoted through the robust involvement of small businesses in the explosive U.S. communications marketplace -- a marketplace capable of generating enormous revenues for the Federal Treasury if the valuable spectrum is fairly and wisely allocated by the Commission.

Congress has consistently urged the Commission to promote small businesses and new technologies. Most recently, in the Budget Act, Congress authorized the Commission to use competitive bidding to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public" as well as promoting "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . ." 47 U.S.C. § 309(j)(3). Further, the Budget Act specifically requires the Commission to ensure that small businesses, rural telcos and businesses owned by minorities and women are "given the opportunity to

participate" in the provision of spectrum based services." 47 U.S.C. § 309(j)(4)(D); see Conference Report at 482-484. Additionally, the House Report notes that "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industry." See H.R. No. 103-111 at 254.

Importantly, the FCC's Small Business Advisory Committee ("SBAC") concluded after careful analysis of the U.S. marketplace that the majority of technological innovations in recent years are attributable to small entities.² The SBAC also recognized the unfortunate, but unavoidable, fact that capital formation is the primary obstacle to market entry by small businesses.³ In addition, the U.S. Small Business Administration ("SBA") filed comments in this proceeding detailing the administration's grave concerns that the Commission's presently proposed safeguards would be inadequate to protect small businesses and would "exacerbate the competitive problems of designated entities." See Comments of the Chief Counsel for Advocacy of the U.S. Small Business Administration on the NPRM, at page 7.

² See Report of The Small Business Advisory Committee To The Federal Communications Commission Regarding Gen. Docket 90-314, September 15, 1993 ("SBAC Report"), at page 5 (Noting that "many technological advances in recent years have been introduced by small firms and new entrants," that "55% of all technological innovations are attributed to firms with less than 500 employees," and that "small firms innovate at a per person rate twice that of large firms, [and] spend more on research and development. . .").

³ As the SBAC has stated, "acquisition and operation of regulated communications facilities is extremely capital intensive . . . without a track record of ownership and substantial capital resources, new entrants typically encounter difficulties obtaining start-up funds." SBAC Report, at page 3.

Thus, based on the informed view of the FCC's own Small Business Advisory Committee and the federal government's expert administration on small businesses, the SBA, there is ample evidence in the voluminous record of this proceeding that, absent sufficient protection in the auction procedures, small and mid-size businesses⁴ will be effectively precluded from making successful bids to acquire licenses for new services such as LMDS due to their predictable lack of financial resources to out-bid large corporations. As a result, LMDS licenses are likely to be concentrated among a few, well-financed, Fortune-500 corporations, thereby severely frustrating the clear intent of Congress to promote small business proliferation, particularly for local services, such as LMDS.

In this regard, Suite 12 reiterates that in implementing its competitive bidding procedures, the Commission should not eliminate the pioneer's preference rules, which are under review in a separate proceeding. See In the Matter of Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking ("Pioneer's Preference Rulemaking"), ET Docket No. 93-266 (released October 21, 1993).

As Suite 12 has argued in its filings in the Pioneer's Preference Rulemaking, the Commission is not mandated nor directed by the competitive bidding provisions of the Budget Act to eliminate pioneer's preferences.⁵ The

⁴ As Suite 12 discussed in its Comments, the proposed "small business" definition, the Small Business Administration's \$6 million net worth or the 1,500 employee limit in 13 C.F.R. §121.601, both are grossly unrealistic. See Suite 12 Comments, at pages 9-11.

⁵ See generally, Suite 12 Comments and Reply Comments in response to the Pioneer's Preference Rulemaking.

competitive bidding scheme was designed by Congress to generate revenue for the Federal treasury in the spectrum licensing process. See H.R. Rep. No. 103-11, 103d Cong., 1st Sess. at 259 (1993). By contrast, the pioneer's preference rules were designed for the wholly independent but equally laudable public policy goal of providing an important incentive to innovators to develop new technologies and services and to assure their expedited availability to U.S. consumers by eliminating the delays and risks associated with the licensing process. See generally, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991). Moreover, as Suite 12 noted in its Comments in the instant proceeding, an auction scheme will not necessarily guarantee that an innovator worthy of a pioneer's preference will in fact receive a license.⁶ Thus, the prospect of a Commission adopted competitive bidding scheme does not in any way diminish or eliminate the important public policy role of promoting technological innovations and services that is the basis for the Commission's pioneer's preference rules.

⁶ For example, to the extent the Commission adopts sealed bidding procedures, a bidder could lose out without having the opportunity to make a counter-offer. Likewise, in a combined bidding scheme, the highest bidder for an individual license in an oral auction could ultimately lose out to a higher, group bid submitted in a sealed bid auction, even if the Commission adopts a second round, sealed bid counteroffer scheme. Furthermore, as explained in Suite 12's Comments at page 7, fn. 4, if the Commission eliminates or amends the pioneer's preference rules, or decides to require payment for pioneer's preference licenses, small entrepreneurial innovators such as Suite 12 will be forced to take on a capital intensive "partner" to obtain the finances necessary to bid or otherwise pay for the license -- causing the pioneer to lose substantial ownership and control over its innovation.

Furthermore, if the Commission decides to subject LMDS to a competitive bidding format, Suite 12 reiterates that the Commission should adopt specific procedures which are necessary to adhere to the explicit Budget Act requirements set forth by Congress.

First, "small businesses" under §309(j) should be defined as businesses with \$75 million or less in annual sales. The two proposed definitions (see footnote 4) are unrealistic and impractical in terms of the actual makeup of the communications marketplace in the United States today. Suite 12 believes that the "\$75 million annual sales or less" definition is the only reliable and regulatory efficient means to allow true "small" businesses in today's burgeoning communications marketplace to compete with the large vertically and horizontally integrated corporate entities that could easily dominate spectrum auctions involving new competitive technologies such as Suite 12's CellularVision system.

Secondly, Suite 12 supports the Commission's proposal to provide preferential payment plans for small businesses to pay for the spectrum they secure by auction. However, Suite 12 proposes that the Commission allow small businesses, which prevail at an auction, to pay the amount of the winning bid on an interest-free, installment basis over the life of the license, beginning in the second year of the license. This plan would allow small businesses to acquire licenses without being crippled financially, while simultaneously enhancing the ability of small business licensees to retain sufficient capital to roll-out their competitive systems and meet the build-out requirements ultimately adopted by the Commission.

Finally, in addition to the various safeguards proposed by the Commission to protect the integrity of the auction process, Suite 12 urges the Commission to limit incumbent spectrum users in competing services (cable, broadcast, and telephone licensees) to holding only non-controlling (i.e., 49% or less) interests in LMDS applicants or licensees. Suite 12 shares the concern expressed by the House Report, that incumbent service providers, who fear real competition from the innovative LMDS service, could win a bid for a license and then, either not deliver the service or do so in a non-competitive manner.⁷ For the large, powerful incumbent cable provider, for example, acquiring a license to offer a competing service such as LMDS would essentially give the incumbent cable operator a license to kill the important consumer-friendly competition which fledgling LMDS operators like Suite 12 could otherwise provide. In designing competitive bidding schemes, especially for new, competitive services such as LMDS, it is crucial that the Commission prevent the cable and telco monopolies from dominating this new service; otherwise, the important, pro-competitive role of this new service will be silenced.

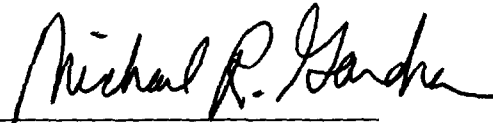
⁷ The House Report noted that "the Committee's record demonstrates that there is a potential in applicants to acquire licenses pursuant to a competitive bidding process for purposes other than delivering a service to the public. For example, an incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition." See H.R. Rep. No. 103-111 at 256.

III. CONCLUSION

Based on the foregoing, Suite 12 urges the Commission to implement competitive bidding schemes in a manner which will not frustrate the important, pro-competitive intent of Congress reflected in the Omnibus Budget Act and expressed by the Commission in its pioneer's preference rules. In addition to retaining the pioneer's preference rules, the Commission, in designing its competitive bidding schemes, should adopt the minimum safeguards discussed above to ensure that U.S. based small businesses continue to play the important and catalytic role of promoting innovations and competition both in the U.S. and in the explosive global communications marketplace abroad.

Respectfully submitted,

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